Teong Kok Kong v Yoahan Marketing (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2-25-35 OF 2002
WAN AFRAH JC
6 APRIL 2004

Administrative Law — Remedies — Certiorari and mandamus — Industrial Court refused to hear joinder application during non-compliance complaint proceedings — Whether Industrial Court committed error of law — Whether Industrial Court acted in excess of jurisdiction — Industrial Relations Act 1967 ss 29(a), 56

Labour Law — Industrial Court — Joining of parties — Joinder application made during non-compliance proceedings — Whether Industrial Court allowed to hear application for joinder made during non-compliance proceedings — Whether words 'in any proceedings before it' in s 29(a) Industrial Relations Act 1967 encompassed non-compliance proceedings under s 56 of Industrial Relations Act 1967 — Industrial Relations Act 1967 ss 29(a), 56

Words and Phrases — 'in any proceedings before it' — Meaning of — Industrial Relations Act 1967 s 29(a)

The Industrial Court found that the applicant had been dismissed without just cause or excuse by the first respondent and awarded him a sum of RM110,000 as backwages and compensation in lieu of reinstatement. Subsequently, when the first respondent failed to comply with the order to pay the sum of RM110,000, the applicant filed non-compliance proceedings pursuant to s 56(1) of the Industrial Relations Act 1967 ('the Act') and thereupon, made an application to join the directors of the company and the holding company as parties pursuant to s 29(a) of the Act. At the inter-partes hearing, counsel for the proposed joined parties objected to the joinder application and contended that the Industrial Court should hear and determine a preliminary point of law, namely, whether there could be a joinder of parties during the non-compliance complaint proceedings. The Industrial Court, after hearing submissions on the issue mentioned above, held that the applicant could not apply to join parties at the non-compliance complaint proceedings stage ('the said award'). Dissatisfied with the Industrial Court's refusal to hear the joinder application on its merit, the applicant filed this application for judicial review to quash the said award on the ground that the Industrial Court had erred in law pertaining to its jurisdiction and failed to take into account relevant factors and cases submitted before it.

The issues for determination in the instant application were whether: (a) the Industrial Court committed an error of law and acted in excess of its jurisdiction when it dismissed the applicant's joinder application that was made during the non-compliance proceedings; and (b) the Industrial Court committed an error of law and acted in excess of jurisdiction when it decided on a preliminary issue and dismissed the joinder application without hearing the same on it merits.

Held, allowing the application:

(1) By virtue of s 29(a) of the Act, which provided that 'the Court may in any proceedings before it: (a) order that any party be joined, substituted or struck off …', the Industrial Court was allowed to hear the application for joinder made by the applicant even during non-compliance proceedings under s 56 of the Act. The words 'in any proceedings before it' as contained in s 29(a) of the Act encompassed all proceedings under the Act, which clearly included non-compliance proceedings under s 56 of the Act (see paras 11–14); *Marathaei Sangulullai & Anor v Syarikat JG Containers (M) Sdn Bhd & Anor* [2003] 2 MLJ 337 followed; *Melewar Trading Corporation Sdn Bhd & Melewar Guangdong Trade & Development Corporation v Mariam bte Sheikh Mohd Shafi* [1991] ILR 160 not followed.

(2) As such, there was no reason why the Industrial Court should not have heard the joinder application before him as there was nothing in either s 29(a) or s 56 of the Act that prohibited a joinder application from being made at non-compliance proceedings. The Industrial Court had obviously committed an error of law. Further, the Industrial Court was wrong and had acted in excess of its jurisdiction when it decided the matter on a preliminary issue and dismissed the joinder application without hearing the merits of the same (see paras 14 and 15).

(3) Accordingly, the said award was quashed and the case was remitted for re-adjudication before another Chairman of the Industrial Court for a proper hearing on the merits of the application for joinder (see para 16).

[**Bahasa Malaysia summary**

Mahkamah Perusahaan telah memutuskan bahawa pemohon telah dibuang kerja tanpa sebab-sebab yang adil atau sah oleh pihak responden yang pertama dan telah memerintahkan pemohon dibayar sebanyak RM110,000 sebagai tunggakkan gaji dan pampasan sebagai ganti diterima bekerja semula. Apabila pihak responden pertama gagal membayar wang tersebut, pemohon telah memfailkan prosiding ketidakpatuhan di bawah s 56(1) Akta Industri 1967 (Akta tersebut) dan telah membuat permohonan untuk percantuman ahli lembaga pengarah syarikat dan syarikat induk yang lain sebagai pihak responden mengikut s 29(A) Akta tersebut. Dalam pembicaraan interpartes, peguam bagi pihak-pihak responden telah membantah cadangan percantuman pihak, beliau juga menegaskan bahawa Mahkamah Perusahaan sepatutnya mendengar dan memutuskan isu fakta perundangan iaitu bolehkah pihak-pihak responden bercantum dalam permohonan prosiding ketidakpatuhan. Mahkamah Perusahaan telah memutuskan bahawa pemohon tidak boleh memohon untuk percantuman pihak dalam prosiding ketidakpatuhan. Pemohon tidak berpuas hati terhadap keputusan Mahkamah Perusahaan dan telah memfailkan permohonannya terhadap kajian kehakiman untuk membatalkan keputusan Mahkamah Perusahaan atas alasan bahawa Mahkamah Perusahaan telah melakukan kesilapan dalam fakta undang-undang dalam bidang kuasanya

dan tidak mengambil kira faktor-faktor yang relevan dan kes-kes lain yang dikemukakan sebelum ini.

Isu yang diambil kira di sini adalah sama ada: (a) Mahkamah Perusahaan telah melakukan kesilapan fakta perundangan dan telah melampau bidang kuasa bila mahkamah tersebut telah menolak permohonan pemohon untuk percantuman pihak semasa prosiding ketidakpatuhan dan (b) Mahkamah Perusahaan telah melakukan kesilapan fakta perundangan dan telah melampau bidang kuasanya apabila membuat keputusan berhubungan dengan isu permulaan dan menolak permohonan percantuman pihak tanpa mendengar merit permohonan tersebut.

Diputuskan, membenarkan permohonan:

(1) Mengikut s 29(a) Akta tersebut, mahkamah dapat membuat keputusan mengenai prosiding sebelum ia (a) membuat aturan bahawa mana-mana pihak boleh dibicarakan atau diganti atau dibatalkan bersama. Mahkamah Perusahaan dibenarkan mendengar permohonan untuk permohonan percantuman semasa pendengaran isu ketidakpatuhan prosiding seperti s 56 Akta tersebut. Perkataan 'in any proceedings before it' seperti tertera dalam s 29 Akta tersebut merujuk kepada kesemua prosiding dalamAktaitu termasuk prosiding ketidakpatuhan dalam s 56 (lihat perenggan 11–14); *Marathaei Sangulullai & Anor v Syarikat JG Containers (M) Sdn Bhd & Anor* [2003] 2 MLJ 337 diikut; *Melewar Trading Corporation Sdn Bhd & Melewar Guangdong Trade & Development Corporation v Mariam bte Sheikh Mohd Shafi* [1991] ILR 160 tidak diikut.

(2) Mahkamah Perusahaan tidak mempunyai sebab untuk tidak membicarakan permohonan percantuman pihak memandangkan s 29 dan s 56 tidak melarang permohonan percantuman pihak dibuat di prosiding ketidakpatuhan. Mahkamah Perusahaan juga telah membuat kesilapan dalam fakta perundangan. Tambahan pula, keputusan Mahkamah Perusahaan salah dan telah melampau bidang kuasanya apabila membuat keputusan atas isu permulaan dan menolak permohonan percantuman pihak tanpa mengambil kira meritnya (lihat perenggan 14 dan 15).

(3) Award yang diterima pemohon telah dibatalkan dan kes tersebut di dengar semula di hadapan Pengerusi Mahkamah Perusahaan yang lain untuk pembicaraan yang lebih tepat atas merit permohonan percantuman pihak (lihat perenggan 16).]

Notes

For cases on certiorari and mandamus, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 394-417.

For cases on joining of parties, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1321-1322.

For certiorari and mandamus, see 9 *Halsbury's Laws of Malaysia* paras [16.117]- [160.146].

Cases referred to

Marathaei Sangulullai & Anor v Syarikat JG Containers (M) Sdn Bhd & Anor [2003] 2 MLJ 337 (folld)

Melewar Trading Corporation Sdn Bhd & Melewar Guangdong Trade & Development Corporation v Mariam bte Sheikh Mohd Shafi [1991] ILR 160 (not folld)

Legislation referred to

Industrial Court Act 1967 s 29(a)
Industrial Relations Act 1967 ss 20(3), 27(1), 56(1)
Industrial Relations Rules 1967 r 3(1)

Jaspal Singh Gill (Raghbir Singh Norizan & Co) for the applicant
P Thavaselvi (Zul Rafique & Partners) for the first to fourth respondents

Wan Afrah JC:

Introduction

[1] This was an application for an order of certiorari to quash the Award of the Industrial Court (hereinafter referred to as the 'IC') No 148 of 2002 dated 25 February 2002 in Case No 1/1-863-2001 by one Mr Teong Kok Kong (hereinafter referred to as the 'applicant').

[2] Also included in this application was an order of mandamus directing that the said case be remitted to the IC for re-adjudication by another Chairman and panel members to hear his application for a joinder of parties pursuant to s 29(a) of the Industrial Court Act 1967 ('the ICA').

Facts of the Case

[3] The applicant was an employee with Yoahan Marketing (M) Sdn Bhd (hereinafter referred to as the '1st respondent') and upon his dismissal, filed a claim for reinstatement pursuant to s 20(3) of the Industrial Relations Act 1967. The matter was referred to the IC vide Case No 4/4-419/99.

[4] The IC in its Award No 537 of 2001 dated 16 July 2001 (hereinafter referred to as the '1st Award') found that the applicant had been dismissed without just cause or excuse by the 1st respondent and awarded him the sum of RM110,000 as backwages and compensation in lieu of reinstatement.

[5] Subsequently, when the 1st respondent failed to comply with the order to pay the said sum as per the 1st Award, the applicant filed non-compliance proceedings pursuant to s 56(1) of the Industrial Relations Act 1967 ('the IRA') and thereupon, made an application to join the 2nd and 3rd respondent (the directors of the company) and the 4th respondent (the holding company) as parties pursuant to s 29(a) of the IRA. The non-compliance complaint proceedings were registered as IC case No 1/1-863/01 and an affidavit to that effect was filed by the applicant. The IC fixed the complaint to be mentioned on 17 October 2001.

[6] On the said date, the IC ordered the parties proposed to be joined to file an affidavit in reply and fixed the joinder application for inter parties hearing on 4 February 2002. By virtue of r 3(1) of the Industrial Relations Rules 1967, the parties proposed to be joined filed Form A and B, which allows the joined parties to be represented by legal counsel. On 19 November 2001, the parties proposed to be joined filed an affidavit in reply opposing the joinder application.

[7] At the inter parties hearing held on 4 February 2002, counsel for the proposed joined parties objected to the joinder application and contended that the IC should hear and determine a preliminary point of law – Whether the applicant could file an application to join parties pursuant to s 56(1) of the IRA, ie whether there could be a joinder of parties during the non-compliance complaint proceedings.

[8] The IC, after hearing submissions on the issue mentioned above, handed down Award No 148 of 2002, wherein it held that the applicant could not apply to join parties at the non-compliance complaint proceedings stage. The Award read as follows:

> In the Court's opinion the two Directors were not heard in their capacity as employers but were heard as witnesses of the Company. Hearing the holding Company at the non-compliance proceeding is not sufficient. It should be heard in the dismissal proceedings.
>
> The Court considered the submission of learned Counsel and is of the opinion that the decision in *Melewar Trading Corporation Sdn Bhd v Melewar Guangdong Trade & Development Corporation v Marian bt Sheikh Mohd Shaft* [1991] 1 ILR 160 is a right decision and should be followed. The case before this Court in on all fours with the authority cited. The Court also agrees that it is contrary to the rule of natural justice in that the proposed third parties did not have the opportunity of being heard at the hearing of the dismissal case. For these reasons, the application is dismissed.

[9] Dissatisfied with the IC's refusal to hear the joinder application on its merit, the applicant filed an application for judicial review to quash the Award No 148 of 2002 on the ground that the IC had erred in law pertaining to its jurisdiction and failed to take into account relevant factors and cases submitted before it.

Issues for Determination

[10] The crux of the case before me was:

(i) Did the IC commit an error of law and act in excess of its jurisdiction when it dismissed the applicant's joinder application that was made during the non-compliance proceedings based on the facts and circumstances of the case? and

(ii) Did the IC commit an error of law and act in excess of jurisdiction when it decided on a preliminary issue and dismissed the joinder application without hearing the same on it merits?

[11] In response to the issues before me, counsel for the respective parties submitted their arguments. In essence, their arguments are as follows:

Respondent's counsel submitted

1. That the IC has no jurisdiction under s 56 of the Industrial Relations Act to hear a joinder application. The jurisdiction of the IC was limited to purely performing the function of enforcing the 1st Award.

2. That the IC in exercising its discretion to allow a joinder of parties under s 29(a) of the Act must employ such discretion judicially and with full regard to the rules of natural justice, ie the parties proposed to be joined must be given the opportunity of being heard.

3. That there cannot be a joinder of parties at non-compliance proceedings stage as the parties proposed to be joined had not been given the opportunity of being heard in respect of the 1st Award.

4. That the applicant should not have made the joinder application after the 1st Award was handed down. It was too late at this stage at the proceedings to make such an application.

Applicant's counsel submitted

1. That the court has the jurisdiction to allow a joinder application '*in any proceedings before it:-(a) order that any party be joined, substituted or struck off*' as stated under s 29(a) of the Industrial Relations Act 1967. Such words expressed 'in any proceedings' encompassed proceedings under s 56 of the Act.

2. That the IC had committed an error of law when it disregarded the words *'in any proceedings'* used in a statute – as expressed to mean as such.

3. That the IC did not hear the application for joinder on its merits. Instead, the IC dismissed the application during the preliminary objection based on *Melewar Trading Corporation Sdn Bhd & Melewar Guangdong Trade & Development Corporation v Mariam bt Sheikh Mohd Shafi* [1991] ILR 160. In the said case, the learned President Mr Tam Kam Weng held as follows:

> It appears to us that s 29 gives the Court the power to do all such things as are necessary in any proceedings before the award is made. Once an award is made, we hold the view that the court has no power to join a third party for the purpose of satisfying the award, as that third party has not been given the opportunity to being heard before the award us entered into against it. The Claimant has knowledge of the existence of the holding company and should have made the application to join the holding company in the proceedings before the award was made. She made no such move to make the application. It is too late in the day for her to make the application now. We are, therefore, of the view that the claimant's application is misconceived and we accordingly dismiss it.

Court's Findings

[12] To me, by virtue of s 29 (a) of the Industrial Relations Act 1967 which states: *'The Court may in any proceedings before it: - (a) order that any party be joined, substituted or struck of*', allows the IC to hear the application for joinder made by the applicant even during non-compliance proceedings under s 56 of the Act.

[13] I adopt the principle in *Marathaei Sangulullai & Anor v Syarikat JG Containers (M) Sdn Bhd & Anor* [2003] 2 MLJ 337, where the Court of Appeal, in defining the words 'In any proceedings before the Court', held that it includes proceedings under s 56 of the Act. In the said case, Gopal Sri Ram JCA whilst referring to the construction of s 27 (1) held – *'The opening words of the section are very clear. And they are very wide indeed. They read "In any proceedings before the court". These words must be taken to mean what they say. "Any proceedings must mean 'any proceedings under the Act'". So, they must include non-compliance proceedings under s 56 of the Act.'*

[14] Similar to the Court of Appeal case cited above and in the present case before me, the words 'in any proceedings before it' as contained in s 29(a) of the Industrial Relations Act 1967, means it encompass all proceedings under the Act, which clearly includes non-compliance proceedings under s 56 of the Act. In light of this, I find no reason why the IC should not have heard the joinder application before him as there is nothing in either s 29(a) or s 56 of the Act that prohibits a joinder application from being made at non-compliance proceedings.

[15] It is obvious to me that the IC committed an error of law when it dismissed the applicant's application for joinder because it was made at the non-compliance proceedings. Further, the IC chairman was wrong and had acted in excess of his jurisdiction when he decided the matter on a preliminary issue and dismissed the joinder application without hearing the merits of the same.

Conclusion

[16] Accordingly, I hereby quash the subsequent Award No. 148 of 2002 and remit the case for readjudication before another Chairman of the IC for a proper hearing on the merits of the application for joinder as allowed under s 29(a) of the Industrial Relations Act 1967.

Award quashed and case remitted for re-adjudication by Industrial Court.

Reported by Lim Lee Na